

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

4 WILLIAM HAAS, on behalf of  
himself and all others  
similarly situated, et al.,

5 Plaintiffs,

6 v.

13 Civ. 8130 (RA)

7 VERIZON NEW YORK, INC. and  
8 WILLIAM J. DeLEON,

9 Defendants.  
10 -----x

11 New York, N.Y.  
September 24, 2015  
2:20 p.m.

12 Before:

13 HON. RONNIE ABRAMS,

14 District Judge

15 APPEARANCES

16 WIGDOR LLP  
17 Attorneys for Plaintiffs  
BY: DAVID E. GOTTLIEB  
RENAN F. VARGHESE  
18 -and-  
BORRELLI & ASSOCIATES  
19 BY: TODD DICKERSON

20 JONES DAY  
21 Attorneys for Defendants  
BY: MATTHEW W. LAMPE  
TONYA BLOSSER BRAUN  
22  
23  
24  
25

1 (Case called)

2 MR. GOTTLIEB: Good afternoon, your Honor, David  
3 Gottlieb from Wigdor LLP for plaintiffs. I'm here with Renan  
4 Varghese, and Todd Dickerson from Borrelli & Associates.

5 THE COURT: Good afternoon, all.

6 MR. LAMPE: Good afternoon, your Honor, Matt Lampe  
7 with Jones Day for defendant Verizon with my partner Tonya  
8 Braun from Jones Day.

9 THE COURT: Good afternoon to both of you as well.

10 Why don't we hear from Verizon first.

11 MR. LAMPE: Thank you, your Honor. Let me start with  
12 the issue of the highly compensated employee exemption. As  
13 your Honor knows, there are three elements to this exemption  
14 and Judge Cott has concluded that Verizon, as a matter of law,  
15 establishes the first two elements, the salary element, and the  
16 second element being the customarily and regular performance of  
17 an exempt duty.

18 So the issue that the magistrate judge found, there  
19 was a factual dispute around, was the third element, which is  
20 whether the primary duty includes the performance of office or  
21 nonmanual work. Judge Cott found a factual dispute about that.  
22 We are challenging that ruling. Our view is that the  
23 undisputed evidence and, in particular, the two named  
24 plaintiffs' declaration, which is at docket number 103-39 and  
25 103-40, their declarations established conclusively that their

1 primary duty does include nonmanual work. That's all that  
2 needs to be established because there is no reasonable genuine  
3 dispute about that. So we should be entitled to summary  
4 judgment on that exemption.

5 THE COURT: Just on that for a moment, we have those  
6 affidavits. But, also, for purposes of your objections to the  
7 report, one of your objections essentially said, look, even if  
8 you take plaintiffs' account as stated by Judge Cott, we still  
9 win under the standard. On that, are there any factual  
10 disputes that you have in the way Judge Cott characterized  
11 plaintiffs' position?

12 MR. LAMPE: Well, since this is our summary judgment  
13 motion, we have to accept Judge Cott's characterization of  
14 plaintiffs' position. Our view, your Honor, is that the  
15 primary duty of the plaintiffs is management. We are not  
16 arguing that today. We have to accept the plaintiffs'  
17 argument, which is that their primary duty consists of these  
18 field inspections. That's what they say is their primary duty.

19 The declarations that I refer to talk about those  
20 field inspections, and they outline very clearly in very  
21 straightforward language what they do when they do their field  
22 inspections. There was quite a bit of back and forth, your  
23 Honor, about the standard and I would like to start just by  
24 addressing that briefly.

25 The regulation requires or states that the third

1 element is established if the employee's primary duty includes  
2 nonmanual work. We argued that the plain meaning should be  
3 honored and respected in our summary judgment papers.

4 Plaintiffs disagreed with that. They said that can't possibly  
5 be the standard. It would make it too easy. They gave an  
6 example of a garbage collector who does some paperwork. They  
7 say that possibly can't be the standard. It was too lenient.

8 Judge Cott was influenced by that, and his point was  
9 that our argument that there is a distinction between the  
10 primary duty being nonmanual work and the primary duty  
11 including nonmanual work was a novel argument that proved too  
12 much and that rendered that element meaningless.

13 I think the point from the plaintiffs' opposition and  
14 from Judge Cott's observations is sort of the same. It is a  
15 very easy standard. The include standard is much less rigorous  
16 and demanding and detailed than the is standard.

17 Let me bring us fast forward to today. In our  
18 objections we spent a lot of time going through how there is a  
19 distinction between is and includes. The department of labor  
20 is very purposeful when it uses includes, when it uses is. The  
21 department of labor has explained why the standard is includes  
22 under the highly compensated employee exemption and how settled  
23 canons of construction require that the includes standard be  
24 given its plain and ordinary meaning.

25 The development since the summary judgment briefing is

1 that plaintiffs now concede that includes is in fact the  
2 standard. In their response to our objections they do not  
3 argue at all that the standard should be is or that the include  
4 standard is not legally valid. As we sit here today, your  
5 Honor, the standard is includes. We have established that.  
6 That's undisputed. And it is what it is. The primary duty, it  
7 doesn't have to consist solely of. It needs only to include  
8 nonmanual work.

9                   With respect to whether the standard is satisfied  
10 here, again, I refer to those two declarations. We picked  
11 those two declarations to make this point because this is the  
12 plaintiffs' own words. It's obviously undisputed for purposes  
13 of our motion, and they describe really two things. They talk  
14 about what they characterize as physical activity associated  
15 with getting to the point where they can make an observation,  
16 so lie on the ground or climbing a ladder or moving around  
17 obstacles and things of that nature. They then describe what  
18 they call, their word, their role, their role in the  
19 observations. And they explain what they do is, they view the  
20 work of their technicians and their role is to answer a series  
21 of questions off of a checklist. They gather facts and they  
22 report those facts to the company. That's how they  
23 characterize their role in these observations.

24                   That really brings up, your Honor, I think, two  
25 questions. One is, is their observations and their answering

1 of the checklist questions part of their primary duty. There  
2 is no interpretation other than that, yes, it is. These  
3 declarations describe what they call their primary duty. It's  
4 the field inspection. There is no dispute about that.

5 The second question is, and the dispositive question  
6 then becomes, are these visual observations and answering  
7 questions off of a checklist and gathering facts and reporting  
8 facts, is that nonmanual? We respectfully submit that there is  
9 no genuine dispute about whether that is nonmanual work. It is  
10 clearly nonmanual.

11 THE COURT: What about what it requires for them to  
12 get there, such that they can do that work? So in these  
13 affidavits they talk about, you know, the conditions about  
14 wearing safety equipment, apparel, accessories and lying on the  
15 ground and climbing over obstacles and crawling in small spaces  
16 and climbing ladders, is that the process of conducting the  
17 inspections? Because what they need to do to be in a position  
18 to do that, is that manual?

19 MR. LAMPE: I actually don't think it meets the  
20 definition of manual work under the regulation. The regulation  
21 speaks in terms of repetitive operations of the hands, physical  
22 skill, and energy. That's the definition that you see in  
23 541.601(d). I don't think that climbing a ladder or lying on  
24 the ground or moving around an obstacle, I don't think that  
25 actually qualifies as manual work under that definition, but it

1 doesn't matter for purposes of our motion, your Honor, because  
2 of the includes standard. That's why the includes standard is  
3 so important. Because even if the Court were to find a factual  
4 dispute about whether climbing ladders and lying on the ground  
5 was manual, there is no dispute that once they do those  
6 things -- and they don't always have to do that, their  
7 declarations are clear. They may sometimes have to do those  
8 things -- once they do those things, what they do next is  
9 nonmanual because they are not inspecting by doing any sort of  
10 a physical test, they are not running electrical tests with  
11 circuitry. They are not pulling wires. They are not doing  
12 testing of concrete samples, like in the Zubair case.

13 The way they do their inspections, once they are in a  
14 position to do the inspection, is observation. They are  
15 evaluating their employees against a checklist of criteria  
16 relating to quality and to safety. And they fill out the  
17 checklist, they fill out these answers, and they report it  
18 back. There is no dispute. No reasonable jury could find that  
19 that is manual work.

20 That is not to say that all inspection work is  
21 nonmanual. I think the point for the Court to understand, of  
22 course, is that inspection work could be manual. It may not be  
23 manual. It just depends. That's a pretty generic term,  
24 inspection work. You can certainly imagine many fields where  
25 the inspection work to determine whether work is in accordance

1 with specifications or whether work is done correctly, it could  
2 certainly involve repetitive operations with the hands and  
3 things that would be manual. For these two named plaintiffs,  
4 based on their own words, it is nonmanual. That's the end of  
5 the inquiry. The department of labor has made it very clear  
6 that the highly compensated employee exemption requires not a  
7 detailed analysis of the duties. And if the employee is  
8 performing regularly and customarily, one of the exempt  
9 functions that Judge Cott found that these two named plaintiffs  
10 are, the only thing that remains is to see whether that primary  
11 duty includes nonmanual work. There can be no reasonable  
12 dispute about that. The plaintiffs' arguments, they have a  
13 number of arguments that I would like to go through those  
14 quickly.

15 They talk about how the inspection work is formulaic,  
16 rudimentary, truly elementary, routinized and based on rigid  
17 guidelines. That may or may not be true. The Court does not  
18 need to decide that because that does not equate to manual.  
19 That may be pertinent to whether the named plaintiffs exercised  
20 discretion and judgment, which is an element that often comes  
21 up in these kinds of cases. We don't need to show discretion  
22 and judgment. Judge Cott has already found we met another one  
23 of the inspection duties. Discretion and judgment is  
24 irrelevant.

25 THE COURT: I think they may have been focusing on the

1 repetitive aspect because of the language in 541.601(d), which  
2 provides examples of nonmanagement production line workers and  
3 nonmanagement employees. I am not going to read all the  
4 examples. But then it says: Other employees who perform work  
5 involving repetitive operations with their hands, physical  
6 skill, and energy are not exempt under this section, no matter  
7 how highly paid they might be. I assume that's part of why you  
8 are getting that repetitive. I assume you will come back and  
9 say that they are not working with their hands.

10 MR. LAMPE: It's an observation. It's a visual  
11 evaluation and it's answering questions off of a checklist.  
12 That is not anything close to manual. But they do make a point  
13 about how it's routinized. They talk about how there are  
14 hazards that they have to encounter. That does not mean that  
15 their visual observations are manual. The fact that they do  
16 their observations in a work area, where there could be dangers  
17 and have to wear a helmet and goggles and steel-toed shoes or  
18 whatever, to me, does not mean that their observations are  
19 manual. In our view that's off point, whether the work is  
20 manual or nonmanual.

21 THE COURT: If the entirety of their job was dangerous  
22 by its nature and potentially unsafe conditions, would that  
23 affect your argument in any way?

24 MR. LAMPE: No. That is off point to whether the duty  
25 is manual or nonmanual. Nonmanual duties can be performed in a

1 dangerous environment. That does not make those duties manual.  
2 The definition, again, of manual, repetitive operations of the  
3 hands, physical skill and energy, you can operate, you can do  
4 that type of work in a dangerous environment, or you can do  
5 work that is not that at all in a dangerous environment. The  
6 environment is not pertinent to whether the duties were manual  
7 or nonmanual.

8 There may be a rough correlation that people who tend  
9 to be in dangerous areas, we may associate them with manual  
10 work. That may be true. But if you look at a shop foreman in  
11 an assembly plant, who is a manager and no one is disputing  
12 that they are a manager, they are right there beside their  
13 employees who are working on furnaces or assembly lines or all  
14 sorts of dangerous things. They would have a hard hat on, they  
15 would have steel-toed shoes, they would have goggles. They are  
16 managing, they are supervising, they are directing. Nobody  
17 would say that their work is manual because they are doing it  
18 in a location, environment where there could be dangers. The  
19 company needs to be safe. And anybody who is in a situation  
20 where there could be danger needs to be protected. That  
21 doesn't mean that their work is converted to manual work.

22 The plaintiffs talk about how the visual observations  
23 are -- and this is their term -- inextricably intertwined with  
24 the manual work, insofar as the climbing and the laying on the  
25 ground is inextricably intertwined with the observations.

1                   First of all, I think you can draw a clean distinction  
2 between the work associated with getting to the vantage point  
3 and then the work associated with doing the visual evaluation.  
4 Be that as it may, the third element of the highly compensated  
5 employee exemption does not state that employees satisfy that  
6 element if their primary duty includes nonmanual work, unless  
7 nonmanual work is inextricably intertwined with manual work.  
8 That last part is not in the regulation. The only inquiry for  
9 the Court is, is the work that's part of the primary duty  
10 nonmanual and whether it's inextricably intertwined or not, in  
11 our view, is not pertinent to the outcome.

12                  The plaintiffs also refer to the fact that their  
13 clients, the plaintiffs, are intermediaries between the techs  
14 and the true managers, to use their term. Again, that's not  
15 pertinent to whether their activities in their visual  
16 observations are manual or not. That's off point to that.

17                  The plaintiff talks about the dexterous acts. That's  
18 just simply saying that they do some work that is manual. If  
19 the Court were to credit that, under the includes standard,  
20 which everyone now concedes is a correct standard, does not  
21 mean that the standard can't be satisfied. It's the nonmanual  
22 work, if it exists, that is important, not the fact that there  
23 may happen to be manual work, also. That does not preclude the  
24 satisfaction of that element.

25                  There is a number of arguments, I alluded to them,

1 about kind of taking this standard to the extremes, the garbage  
2 collector who does paperwork or Judge Cott used the example of  
3 the auto mechanic who orders parts. What I would say about  
4 that is, first of all, it is supposed to be a lenient standard.  
5 But what's missing from both those examples and how you cannot  
6 conclude that the garbage collector would be exempt is that a  
7 garbage collector and an auto mechanic would never be in a  
8 position to even get to the issue of there was nonmanual work  
9 because neither of those positions would satisfy the second  
10 element of the exemption, which is that they customarily and  
11 regularly perform an exempt duty. If you don't customarily and  
12 regularly perform an exempt duty, you don't even get to the  
13 question of whether the primary duty includes nonmanual work.  
14 So I don't think the Court should be discouraged from being  
15 faithful to the plain meaning because of a concern about where  
16 it could lead. Those examples, I don't think, are on point.

17 THE COURT: You keep saying that this is supposed to  
18 be a lenient standard, but I'm supposed to construe FLSA  
19 essentially narrowly against the employer, correct?

20 MR. LAMPE: That's what the law says, your Honor. In  
21 order to be exempt, an employee has to plainly and unmistakably  
22 meet the requirements of the exemption and that is completely  
23 consistent with what we are telling your Honor today, that the  
24 only issue is the visual observations. Their visual  
25 observations are plainly and unmistakably nonmanual. Their

1 filling out of a questionnaire is plainly and unmistakably  
2 nonmanual. And so even if the exemptions are construed  
3 narrowly, the exemption is clearly satisfied in this case.

4 Let me turn to the Zubair and the Switzoor cases,  
5 which are referred to quite a bit in the papers. Plaintiffs  
6 characterize those cases as categorically stating that people  
7 who do inspections in the field are doing manual work and that  
8 takes those cases way beyond what they actually say.

9 THE COURT: Let me just say, Switzoor was my opinion.  
10 You don't need to address that. It was in a footnote that this  
11 issue was not at issue in the case. Why don't you address  
12 Zubair.

13 MR. LAMPE: Thank you, your Honor. Zubair did not in  
14 any way categorically state that all inspectors do manual work.  
15 And had the Court said that, it would have been improper  
16 because the FLSA makes it very clear, and plaintiffs themselves  
17 concede this, is that exemptions need to be determined based on  
18 all the facts and the circumstances. And exemptions should  
19 never be decided based on labels. 541.2, the very beginning of  
20 this part of the regulations, says: Titles don't determine  
21 exempt status. It's the duties.

22 And if you just look at the Zubair case, your Honor,  
23 there is nothing in that decision that would suggest that the  
24 Court there was trying to make some categorical determination  
25 about all inspectors. The Court in that case talked about what

1 the evidence showed about that particular plaintiff. The  
2 defendant in that case was relying on the highly compensated  
3 employee exemption and the only argument it put forward was, as  
4 the Court characterizes it, a conclusory argument that because  
5 the employee was a professional, the employee met the highly  
6 compensated employee exemption. And the Court went on to look  
7 at what the duties were and said that the duties were to make  
8 sure contractors are performing according to specifications,  
9 and it concluded that the highly compensated employee exemption  
10 couldn't be satisfied.

11                   But what you don't see in that decision is much  
12 analysis, really any analysis, about how the plaintiff confirms  
13 that the contractors are doing work according to the  
14 specifications. The how is missing. There is no discussion of  
15 how the plaintiff in that case did that. So we don't know  
16 whether it was through visual observations, we don't know  
17 whether it was through manual testing. We do know that the  
18 Court mentioned that that particular plaintiff did do manual  
19 testing, testing of paint and concrete samples.

20                   But the Court certainly, in our view, should not  
21 extrapolate from that Zubair case to say all inspections in the  
22 field are manual or that these two plaintiffs in this case work  
23 is manual because the facts simply don't line up and there is  
24 insufficient analysis in Zubair to allow the Court to make any  
25 sort of extrapolation to the facts of this case.

1                   To wrap up this point, and I'll move on, a reasonable  
2 jury could not find that the visual observations in the  
3 answering questions in the manual work, and because of that we  
4 are entitled to a finding that we satisfy, as a matter of law,  
5 the third element. All three elements are satisfied. The two  
6 named plaintiffs are exempt under the highly compensated  
7 employee exemption. Their FLSA claims should be dismissed  
8 because there are over 100,000 for all the years covered by  
9 that claim, and their New York Labor Law claims should be  
10 dismissed for the years prior to the FLSA period, their  
11 compensation was over 100,000, and it's several years as well  
12 there.

13                   THE COURT: What would happen if I were to agree with  
14 you about that? What would happen to the rest of the case?

15                   MR. LAMPE: Let me turn to that, your Honor. Our  
16 argument and our objections is that it was an error for Judge  
17 Cott to grant a conditional certification motion. He was doing  
18 so under the belief that the plaintiffs had viable claims. The  
19 plaintiffs do not have viable FLSA claims. As your Honor  
20 knows, conditional certification relates only to the FLSA  
21 claims.

22                   Because they don't have viable claims, their motion  
23 for a conditional certification should not have been granted.  
24 The plaintiffs in their response to our objections talk about  
25 what should happen if the Court were to conclude that we win on

1 the highly compensated employee exemption and they talk about  
2 the Court possibly granting the motion anyway. I think that  
3 would not be correct. If the named plaintiffs were seeking the  
4 relief, have no claim as a matter of law, the Court should not  
5 grant their request for that relief.

6 THE COURT: Can we have an entirely separate suit  
7 brought by other plaintiffs who weren't paid that much?

8 MR. LAMPE: I wouldn't say that, your Honor. The  
9 other suggestion of the plaintiffs was that they be permitted  
10 to substitute. I could see that the Court would find that that  
11 might be a reasonable thing to do. There would be certain  
12 stipulations that I think that would be necessary.

13 THE COURT: And then do the collective certification  
14 motion over? Is that the idea?

15 MR. LAMPE: Here is what I would say, your Honor. I  
16 would suggest a couple of things. First of all, there needs to  
17 be a substitution so some opt-in will have to agree to be the  
18 named plaintiff. The complaint should be amended to make it  
19 clear that the claims are only on behalf of people for time  
20 periods in which they were under a hundred thousand dollars.  
21 And the request for conditional certification should be  
22 narrowed so that the request is only with respect to  
23 individuals during time periods when they were under \$100,000.  
24 Of the 80 some opt-ins in the case right now, those who are  
25 over 100,000 for all years in the FLSA period should be

1 dismissed from the case.

2 And what I think the Court should do that I think is  
3 sensible is that the Court order the parties to meet and confer  
4 along the following lines, that a lot of the evidence -- let me  
5 explain. The plaintiffs move for conditional certification and  
6 a lot of evidence that they cited, declarations from opt-ins  
7 and the like, came from people who are over a hundred thousand.  
8 There is a number of people, though, among their group of  
9 opt-ins, they are affiants, who are under 100,000 for the  
10 entire time period. The plaintiffs should assemble the  
11 evidence that they have for people who are eligible, the  
12 individuals who are under \$100,000, the evidence from the  
13 individuals who were under \$100,000. And the parties should be  
14 required to meet and confer over whether or not this change in  
15 the eligible evidence would affect the character of the  
16 plaintiffs' presentation of evidence.

17 The defendant should not be permitted to require a  
18 do-over if they basically have the same evidence even based on  
19 the subset of affiants who would be eligible. And the parties  
20 should be required to ask whether there is any good-faith basis  
21 that we would have at all to require them to brief the motion  
22 with the subset of evidence. And, again, if it doesn't change  
23 the character of the evidence, we would have no good-faith  
24 basis to do that, and the parties should meet and confer over  
25 what the notices should say. I think that would be the best

1 way for the Court to handle the conditional certification,  
2 particularly if the Court granted us summary judgment as to the  
3 plaintiff's FLSA claims.

4 Let me just briefly address the element about  
5 customary and regular performance of the exempt duty of  
6 directing two or more employees. We raised that as part of our  
7 summary judgment motion. Judge Cott found that there was a  
8 factual dispute about whether or not the two named plaintiffs  
9 customarily and regularly direct the work of two or more  
10 technicians. We ask the Court to look at that fresh.

11 And what I would say on that score is for the Court to  
12 focus on page 4 of the report and recommendation. This is  
13 where Judge Cott identifies the managerial duties of the two  
14 named plaintiffs that are undisputed. And, in particular,  
15 Judge Cott explains that the plaintiffs take attendance. If  
16 plaintiffs see that a technician does not have sufficient work,  
17 they coordinate with the dispatch department, which is  
18 initially responsible for assigning work. Other duties of  
19 plaintiffs' performance include: Monitoring the start and end  
20 times of technicians' jobs, ensuring the technicians only take  
21 an hour lunch break, informing technicians of proper procedures  
22 to follow, approving job deviations, coordinating team work  
23 among technicians, advising technicians how to handle difficult  
24 customers, and attending grievance proceedings. Judge Cott  
25 said on that same page that the plaintiffs agree that those are

1 their duties.

2 Also, on page 34, Judge Cott cites the deposition  
3 testimony of plaintiff Haas wherein he indicates that the local  
4 managers initiate discipline by bringing a problem to his  
5 superior's attention. If the Court looks only at those  
6 managerial duties that are undisputed, we respectfully submit  
7 that the Court would find as a matter of law that that work  
8 constitutes directing the work of two or more employees.

9 And the plaintiffs in the court both talk about the  
10 Lema factors, which are the factors identified in the Lema  
11 case, and almost all of those factors are satisfied based  
12 solely on the managerial duties that are undisputed,  
13 instructing employees. Judge Cott found, in essence, that they  
14 do that. Training employees, telling them how to do their job,  
15 what procedures to follow, how to deal with difficult  
16 customers. That's training. Reporting poor performance to the  
17 superiors. Plaintiff Haas admitted that he does that. Setting  
18 schedules. They are involved in setting the schedules and  
19 maintaining the schedules. The last Lema factor is whether the  
20 plaintiff pays the employees and we are not claiming that these  
21 two named plaintiffs do. But all of those other factors are  
22 satisfied.

23 Our position is that the Court should find as a matter  
24 of law that the two plaintiffs do customarily and regularly  
25 direct the work of two or more technicians. And I should point

1 out, your Honor, on this score that this element, that  
2 customarily and regularly directed work, does not have to be  
3 the plaintiffs' primary duty. This can be something outside  
4 the primary duty. It just has to be done customarily and  
5 regularly.

6 Another element of the executive exemption deals with  
7 the primary duty. We are not asking the Court to make any  
8 determination that the primary duty is management. We think it  
9 is. We are not going to ask the Court to make a determination  
10 that there are no factual disputes about that. But we are  
11 asking the Court to make a determination that there are no  
12 factual disputes about whether the two named plaintiffs  
13 customarily and regularly directed work because based solely on  
14 what the Court, Judge Cott, has already found to be undisputed  
15 that they do.

16 Unless the Court has questions.

17 THE COURT: No. Thank you.

18 MR. GOTTLIEB: Thank you, your Honor. I'm happy to  
19 run through my outline as well or can answer any direct  
20 questions.

21 THE COURT: I really would love to start with what  
22 your position is on includes versus is. I read your brief  
23 frankly the way that defendants articulated it, that you agree  
24 that the standard is includes and not is. I just want to  
25 confirm that that's true.

1                   MR. GOTTLIEB: Yes. Certainly, your Honor. The  
2 regulation uses the word includes. We can hardly dispute that.

3                   THE COURT: Was Judge Cott wrong in how he analyzed  
4 that?

5                   MR. GOTTLIEB: No. Actually, Judge Cott got it  
6 completely correct. This issue was briefed before Judge Cott.  
7 This wasn't a situation where Judge Cott worded a decision and  
8 ignored the parties' briefing. The issue of includes versus is  
9 was briefed before Judge Cott and Judge Cott considered the  
10 briefing and determined whether you interpret the word includes  
11 closer to is or whether you use the word includes either way  
12 results in the same outcome because the plaintiffs' primary  
13 duty here did not involve nonmanual work. So in footnote 22 of  
14 Judge Cott's decision, your Honor, he said: Even if the Court  
15 were to accept the distinction drawn in Hicks, which is the  
16 distinction between includes and is, the question still remains  
17 whether plaintiffs' primary duty includes office or nonmanual  
18 work.

19                   THE COURT: Is a tougher standard to meet, right? If  
20 I'm interpreting includes to be closer to is, it's a tougher  
21 standard.

22                   MR. GOTTLIEB: I would agree with that, yes. Includes  
23 would be a tougher standard for us, certainly, than is. But,  
24 again, what we need to look at here is only the primary duty.

25                   THE COURT: We are all on the same page about that.

1                   MR. GOTTLIEB: I think not only are we on the same  
2 page, I think Judge Cott was on the same page as well. I think  
3 to the extent we have any disagreement, it's only over whether  
4 Judge Cott used the include standard, which we believe he did.

5                   THE COURT: Tell me how, again, looking at the  
6 language that I read earlier about employees who perform work  
7 involving repetitive operations with their hands, physical  
8 skill, and energy are not exempt under the section, no matter  
9 how highly paid they might be.

10                  MR. GOTTLIEB: Again, we need to look at the primary  
11 duty. So the primary duty here for the local managers is field  
12 observations. And during these field observations they are  
13 doing physical tasks to conduct a rigid checklist.

14                  THE COURT: The physical skill is what?

15                  MR. GOTTLIEB: The physical skill is in our brief,  
16 your Honor, climbing ladders, going down manholes, contorting  
17 their bodies in ways to be able to observe what they need to  
18 observe. There is lying on the ground, there is climbing into  
19 and around trucks. The primary duty, the task of doing field  
20 observations, it's a physical task.

21                  THE COURT: Does it require skill to actually do it?

22                  MR. GOTTLIEB: It requires a level of skill.

23                  THE COURT: What level of skill? Like to get  
24 somewhere. I understand the safety hazard. But what's the  
25 skill involved.

1                   MR. GOTTLIEB: It involves physical dexterity and an  
2 ability to conduct -- it would just be the skill of engaging in  
3 physical activity to perform your job. This is not standing  
4 somewhere and making an observation. This is contorting your  
5 body in a way so you can get into the right place. Going down  
6 manholes.

7                   For that reason, because of these physical tasks that  
8 are inherent in this job, field observations, the local  
9 managers are required to wear safety equipment because injuries  
10 can happen in this job. So all of these things, your Honor,  
11 need to be a factor and are a factor, and Judge Cott correctly  
12 found there were factors in determining whether there is an  
13 issue of fact here. There is an issue of fact as to whether  
14 these field observations involved nonmanual work. The  
15 nonmanual work that the defendants point to here is  
16 observations. And, your Honor, there is not a single case that  
17 defendants have pointed to or that we are aware of exists that  
18 said observations, while somebody is performing physical  
19 activity --

20                  THE COURT: What about Zannikos? What about the  
21 Zannikos case which is the Fifth Circuit case involving the  
22 marine superintendents who observed the oil transfers to verify  
23 the performance was accurate, legal, and safe?

24                  MR. GOTTLIEB: Yes. So Zannikos, your Honor, that was  
25 a case involving oil inspectors and they would essentially

1 observe the transfer of oil between trading partners. That was  
2 their job, to inspect that operation. And the Court there  
3 found that they were exempt really because of the fact that  
4 they were performing administrative tasks and there was no  
5 analysis about whether they were conducting any manual labor,  
6 engaging --

7 THE COURT: What's the manual labor that your clients  
8 are conducting?

9 MR. GOTTLIEB: Again, just to compare it to Zannikos,  
10 Zannikos, as I understand it from the decision, literally an  
11 inspector standing somewhere watching the way oil is  
12 transferred between two trading partners, whereas in our case  
13 we have local managers who are going into the field, who are  
14 going down manholes, who are contorting their bodies in ways to  
15 gain access to areas who are themselves in physical danger and  
16 that's why they need to wear safety equipment. Zannikos, there  
17 is no indication that there is any safety hazard or any hazard  
18 whatsoever.

19 THE COURT: Is the standard safety hazard or is the  
20 standard involving repetitive operations with their hands,  
21 physical skill, and energy.

22 MR. GOTTLIEB: The standard, your Honor, I think,  
23 involves both. And the repetitive task involving physical  
24 skill and dexterity, that's a nonexhaustive description of what  
25 nonmanual tasks are. Judge Cott correctly found that safety

1 and the possibility of getting injured and essentially being on  
2 your hands and knees and lying on your back, those are things  
3 that should be considered in determining whether a duty  
4 involves manual or nonmanual tasks. In Zannikos there was none  
5 of that. Zannikos was mere observations from afar. And the  
6 Zubair case I think is the most on-point case. And contrary to  
7 what my adversary said, there was a description of the duties  
8 there. And there you had a senior inspector who was inspecting  
9 New York State Department of Transportation bridges and  
10 highways, and there was a detailed description of the  
11 plaintiffs' duties there. And it said that they go out into  
12 the field. Just like our clients, they inspect the work that's  
13 done by, in that case, subcontractors; in our case,  
14 technicians, and they determine whether the work is being done  
15 in accordance with contract specifications.

16 THE COURT: There they are testing the paints, right?  
17 They are actually testing the concrete and paint samples  
18 themselves. They are doing the manual labor. They are not  
19 just watching or looking and filling out a checklist. They are  
20 actually doing.

21 MR. GOTTLIEB: They did do some sort of paint work.  
22 Again, your Honor, the issue here is includes. If the  
23 plaintiffs in Zubair do their inspection work, which is nearly  
24 identical to what the plaintiffs were doing here, if that  
25 didn't include nonmanual work, then our clients can't either.

1 Because our clients were -- again, I hate to be repetitive --  
2 they were on their hands and knees doing physical tasks while  
3 they were doing these field inspections, which goes far beyond  
4 the testing of paint, which is the only specific manual task  
5 that was referenced in Zubair. Our clients were doing far more  
6 physically natured tasks in doing their field inspections than  
7 what the plaintiffs were doing in Zubair.

8                   And in Zubair, your Honor, the Court granted summary  
9 judgment in the plaintiffs' favor. There are certainly issues  
10 of fact based on our client's declarations, based on what these  
11 field inspections entailed as to whether their primary duty,  
12 these field inspections, involved nonmanual duties.

13                   THE COURT: If I take everything in the affidavits you  
14 submitted to be true and I agree for purposes of this motion  
15 that the inspection duties were the crux of the plaintiffs'  
16 job, it's a question of law, not a question of fact, right?  
17 It's a question of law as to whether the exemption applies.  
18 It's not a question of fact, right?

19                   MR. GOTTLIEB: It's a question of fact whether the  
20 tasks that they were engaging in were manual.

21                   THE COURT: You submitted all of your facts. You  
22 completed discovery. If I take all of your facts to be true so  
23 as to avoid a situation where there is a genuine issue of  
24 material fact, I take every fact that you submit to be true,  
25 then there just a question of law left, right?

1                   MR. GOTTLIEB: That is correct.

2                   THE COURT: And in terms of the way Judge Cott  
3 characterized your client's inspections, is there anything that  
4 you would change in terms of his characterization, anything you  
5 are objecting to in his characterization of the job?

6                   MR. GOTTLIEB: It was a 50-page decision, your Honor.  
7 But in terms of that section, the 601(d) section, I would agree  
8 with Judge Cott's characterization, yes.

9                   THE COURT: Now, let me ask you a different question.  
10 Is the physical activity that you described that your clients  
11 performed to get to the place where they do the inspections,  
12 right? That's your point, if I understand correctly, is that  
13 the physical activity is really required to get to the place  
14 where you can then conduct the inspection, right? That's like  
15 bending down and going up a ladder. It's so that you can do a  
16 proper inspection, right?

17                   MR. GOTTLIEB: It's part of it.

18                   THE COURT: The inspection is looking, but you have to  
19 do what you described, which can often be difficult, according  
20 to your clients, to get to the place where they can do the  
21 inspections, right. It's not like the inspections require more  
22 physical activity during one inspection than the other. It may  
23 just require more to get to the place where you can do the  
24 inspection, right?

25                   MR. GOTTLIEB: I think I agree with your Honor. I am

1 having a hard time with the phrase get to because at the same  
2 time that they are doing the observations, they are in these  
3 positions. For instance, a local manager could be in a  
4 physically uncomfortable or physically difficult or strenuous  
5 position while performing an observation. That's why I'm  
6 having a hard time with the phrase get to. But I think we are  
7 generally on the same page.

8 THE COURT: Are you saying that there is literally  
9 physical skill or energy or use of your hands required in  
10 conducting an inspection, or are you saying kind of get to the  
11 place where you can conduct the inspection, that requires use  
12 of your hands, physical skill?

13 MR. GOTTLIEB: If I may, your Honor, maybe somewhere  
14 in between. There may be some circumstances, for instance,  
15 going down a manhole where, yes, climbing down a ladder is a  
16 physical task that helps the local manager get to a place where  
17 they can conduct an observation or inspection, but there may be  
18 other situations where while they are doing the observation  
19 they need to be lying on the ground or in a physical difficult  
20 position. Sometimes it may be getting to the location and  
21 other times it may be as they are actually doing the  
22 observation and inspection.

23 THE COURT: I guess what I was getting at is why this  
24 physical activity isn't directly and closely related, which is  
25 defined to include work that may include physical tasks and

1 menial tasks that arise out of exempt duties, basically reading  
2 from 29 CFR 541.703. And I'm asking if that's what this is.  
3 If the activity is something that's directly and closely  
4 related to the inspection as opposed to the inspection itself.  
5 That's my question.

6 MR. GOTTLIEB: Again, there is nothing, your Honor.  
7 Even were that to be the case, there is nothing that says that  
8 observations are *per se* nonmanual work. There is no *per se*  
9 rule to that extent. So I think in this situation it's  
10 impossible to separate the physical task from the observation  
11 because they are completely connected.

12 In *Zannikos*, for instance, there you had observations,  
13 and that was an out of circuit case, of course. In *Zannikos*,  
14 you had observations where there was no physical activity  
15 whatsoever associated with the observation. Perhaps that was  
16 why the Ninth Circuit went the way they did on that case. But  
17 that's not what we have before the Court. We have a situation  
18 where physical tasks are what the job requires and are what the  
19 job completely entails.

20 THE COURT: Your clients are not doing the same thing  
21 as the technicians. You are not suggesting that.

22 MR. GOTTLIEB: They are not doing the same exact thing  
23 as technicians, no.

24 THE COURT: The technicians are installing cable boxes  
25 essentially.

1 MR. GOTTLIEB: Things of that nature.

2 THE COURT: Your clients are going to inspect to see  
3 if that was properly done, right? They are not using their  
4 hands to do it.

5 MR. GOTTLIEB: I would say they are going into the  
6 field to inspect whether these things were done in accordance  
7 with company checklists. They weren't making any determination  
8 independently, was this done the right way. They are just  
9 going down a checklist. Again, your Honor --

10 THE COURT: To report back to headquarters.

11 MR. GOTTLIEB: Exactly. Act as intermediaries to give  
12 that information back to their manager, the area manager they  
13 are called.

14 THE COURT: If there was an area manager, which is one  
15 level above, right, if those were the people, if one day one of  
16 the area managers came out and said, I want to do the  
17 inspection myself, is that someone who would not qualify for  
18 this exemption?

19 MR. GOTTLIEB: If they did on one day go into the  
20 field? The issue is primary duties. That's why the area  
21 manager would never qualify.

22 THE COURT: My question is, does it matter how high up  
23 the person is who is going to do the inspection or does it  
24 matter how much of their job entails doing the inspections?

25 MR. GOTTLIEB: It would be the latter. Because the

1 issue is primary duty. The area managers, or even someone  
2 above them, anybody could go into the field and do an  
3 observation on a particular day. But this was our clients, the  
4 local managers' primary duty that they did every single day,  
5 every single day, put on safety gear. They went out into the  
6 field and they had to put themselves in the hazardous  
7 situations to conduct these observations.

8 To say that merely because their eyes are opened and  
9 they are observing things they are somehow doing nonmanual  
10 work, like Judge Cott said, it would reduce this element to the  
11 meaningless, because every single job involved people keeping  
12 their eyes open and observing what they are doing. It would  
13 really reduce this nonmanual prong of the highly compensated  
14 exemption to meaningless, and that's certainly not what we  
15 should assume Congress was intending to do when this regulation  
16 was promulgated.

17 THE COURT: Does it matter at all that the purpose of  
18 the technician's job, the primary duty, the purpose of their  
19 primary duty is to install a cable box as opposed to the  
20 purpose of the primary duty of your clients, under your theory,  
21 was to report back to headquarters. Essentially, they fill out  
22 a checklist.

23 MR. GOTTLIEB: Your Honor, I think the regulation  
24 would control here. The regulation would control. And the  
25 only issue is whether the primary duty involves nonmanual work.

1 And it doesn't. The primary duty was going out into the field  
2 and conducting these inspections. The mere fact that they  
3 relay information to their manager does not change the fact  
4 that their primary duty is going out into the field.

5 THE COURT: What's repetitive? I know you think the  
6 forms are repetitive. Are you saying what they do is much more  
7 than fill out forms? What's repetitive of what they do?

8 MR. GOTTLIEB: Certainly the forms are a repetitive  
9 element to what they do. They are going out into the field and  
10 they have to -- not to answer with a term, but they are  
11 repetitively going out into the field and doing the same types  
12 of observations.

13 THE COURT: But you said it is different in every  
14 situation, right?

15 MR. GOTTLIEB: Well, there are certainly some  
16 differences. There could be some situations where they are  
17 going down manholes, some situations where they are inside  
18 apartments, they are inside businesses doing various things.  
19 But these are the same types of tasks that they are doing, the  
20 same physical tasks they are doing over and over and over  
21 again, every day. That's why they are wearing the same safety  
22 equipment. And this is what they are doing day in and day out.  
23 Is it repetitive in the way an assembly line worker's work is  
24 repetitive? No. That's taking it to an extreme and I don't  
25 think it needs to be repetitive at that level to be considered

1 nonmanual. Here we have local managers going out into the  
2 field every single day, doing this same type of physical work  
3 in order to do their jobs.

4 THE COURT: Physical work, again, is getting to a  
5 place where you can do the inspection.

6 MR. GOTTLIEB: Again, I think we have a slight issue  
7 with the getting to.

8 THE COURT: When you say physical work, the inspection  
9 is filling out a form. That's what you are doing. You are  
10 filling out a form which you describe how rote and routine it  
11 is and requires very little thought or analysis, as I  
12 understand your client's allegations. That's what they are  
13 there to do. But the physical work is to get to a place where  
14 you can fill out that form, is that right? I'm sorry I keep  
15 asking the same question.

16 MR. GOTTLIEB: I'm sorry to answer it in the same way.  
17 But the physical activity, your Honor, is, it can't be easily  
18 separated as getting to because very often this is -- part of  
19 the observation is that they need to be in a physically  
20 demanding and physically strenuous position or circumstance.  
21 That's why it can't be separated as, first, I am going to do  
22 physical activity to get somewhere and then I am going to do  
23 nonphysical activity. It's all intertwined together. And  
24 that's what their primary duty is.

25 THE COURT: What's in the record about the physical

1 either requirements or tests required to do this job? Do you  
2 require a stress test, notice from a doctor? Is there anything  
3 in the record about sort of a physical test that can qualify  
4 you to do this physically strenuous job?

5 MR. GOTTLIEB: Can I have a moment to speak with my  
6 clients?

7 THE COURT: Sure.

8 MR. GOTTLIEB: I don't think, your Honor, that there  
9 is any sort of test that's used to evaluate physical strength  
10 or dexterity or anything of that nature, and I don't think the  
11 regulation would require that. Certainly something like that  
12 would further the proposition that the primary duty involved  
13 physical activity. Here all we need to do is look at their  
14 declarations, the way they have described their job. I don't  
15 want to keep repeating myself about the physical tasks that  
16 they are engaged in.

17 THE COURT: Thank you so much. Unless you have  
18 anything else.

19 MR. GOTTLIEB: I'm happy to address the other points  
20 regarding conditional certification, if you'd like.

21 THE COURT: Sure. Why don't I hear you on that.

22 MR. GOTTLIEB: I think, actually, my adversary  
23 mentioned something different than what was in their brief,  
24 which was, to the extent your Honor did grant summary judgment  
25 in the defendants' favor, substituting in the new plaintiff and

1 moving forward with conditional cert. under those  
2 circumstances, I think that probably would be amenable to us.  
3 But I would just need to flesh out exactly the procedure behind  
4 it. But I think that's what we proposed, I believe, in our  
5 brief. And there may be some agreement there.

6 THE COURT: Thank you very much.

7 Would you like to respond.

8 MR. LAMPE: I have nothing further, your Honor, unless  
9 there are questions.

10 THE COURT: That's it. I just want to thank the  
11 lawyers for their excellent advocacy and their briefs and  
12 today.

13 I will reserve decision. Thank you.

14 ooo  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25